

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| In the Matter of |) | |
| |) | IB Docket No.03-38 |
| Philippine Long Distance Telephone Company |) | |
| Globe Telecom, Inc. |) | |
| |) | |
| AT&T Emergency Petition for Settlement |) | |
| Stop Payment Order and Request for |) | |
| Immediate Interim Relief |) | |
| |) | |
| Petition of WorldCom, Inc., for Prevention of |) | |
| "Whipsawing" on the U.S.-Philippines Route |) | |

To The Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 1.106 of the Commission's Rules¹, the Philippine Long Distance Telephone Company ("PLDT"), by its attorneys, hereby petitions the Commission to reconsider the Commission's decision, in its *Order on Review*² in the

¹ 47 C.F.R. § 1.106. To the extent Section 1.429 provides a basis for reconsideration, PLDT alternatively bases its Petition on that rule. PLDT meets the standard for reconsideration under either 47 C.F.R. § 1.106(b)(2) or 47 C.F.R. § and 47 C.F.R. § 1.429(b), relying as it does upon events occurring after the close of the formal pleading cycle on PLDT's Application for Review. Certain of these events had occurred and were referenced in *ex parte* letters submitted by PLDT's counsel after the formal pleading cycle, *see* Letter from Henry Goldberg, Counsel for PLDT, to Marlene H. Dortch, Federal Communications Commission, IB Docket No. 03-38 (filed December 5, 2003); Letter from Margaret Pfeiffer, Counsel for PLDT, to Marlene H. Dortch, Federal Communications commission, IB Docket No. 03-38 (filed February 13, 2004). The ability to submit *ex parte* letters, however, is not the same as a right to formal pleading; otherwise the right to seek reconsideration based upon new evidence and events effectively would be precluded.

² *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of Worldcom, Inc. for Prevention of*

above-captioned proceeding, not to vacate the underlying Bureau *Order*³ as moot.⁴ In furtherance of this request, PLDT demonstrates the following:

(i) No live case or controversy exists, requiring vacation of the Bureau's *Order* as moot under long-standing Commission policy. The genesis and thrust of the Bureau *Order* was the need to restore direct connection of circuits between PLDT (and other Philippine carriers) and the petitioners, AT&T and MCI. By January, 2004, AT&T and MCI had concluded agreements with all the relevant Philippine carriers, who then re-established direct connections. Not only has direct connection been restored, there is no commercial dispute related to this proceeding between Philippine carriers, on the one hand, and AT&T and MCI on the other. Absent a live dispute, long-standing Commission policy mandates that the Bureau's *Order* be vacated as moot.

(ii) There is no benefit to maintaining the Bureau's *Order* in effect. The *Order on Review* expressly states that the Bureau's *Order* "did not create a new rule."⁵ Assuming the correctness of the Commission's view that the Bureau's *Order* merely expressed the agency's understanding of its policy and rules on whipsawing⁶ at the time the Bureau's *Order* was issued in March 2003, that interpretation can have no precedential value given the Commission's views expressed in the 2004 *ISP Reform Order*,⁷ which addresses the very same issues. If the Commission precedent prior to the

"Whipsawing." *Order on Review*, IB Docket No. 03-38, FCC-04-112, rel. June 4, 2004 (the "*Order on Review*").

³ *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of Worldcom, Inc. for Prevention of "Whipsawing."* *Order*, 18 FCC Rcd 3519 (2003) (the "Bureau's *Order*").

⁴ *Order on Review* at ¶ 42-45.

Bureau's action in 2003 authorized the Bureau's actions, then there was no need for the *Order on Review*, and the Commission should have vacated the Bureau's *Order*.

(iii) Vacating the Bureau's *Order* would promote comity between the United States and the Philippines, including its telecommunications regulatory authority, the National Telecommunications Commission ("NTC"). Vacating the Bureau's *Order* would be consistent with the words and spirit⁸ of reconciliation brought to bear by both regulatory agencies to resolve the commercial matters previously in dispute between the U.S. and Philippine carriers that gave rise to this proceeding. Leaving in place a decision that is moot in all material respects and that is substantially premised on criticism of the Philippine regulatory system's treatment of agreements between Philippine carriers in the Philippines is not only unnecessary, but harmful to the public interest. Strong commercial relations between U.S. and Philippine carriers are in the U.S. public interest,

⁵ *Order on Review* at ¶ 36.

⁶ *Order on Review* at ¶¶ 36 and 44.

⁷ *International Settlements Policy Reform International Settlement Rates, IB Docket No. 02-324, First Report and Order, 19 FCC Rcd 5709 5729-33 (2004) (the "ISP Reform Order")*.

⁸ *See, e.g.*, Letter from Armi Jane R. Borje, Chairman, National Telecommunications Commission ("NTC"), to Michael K. Powell, Chairman, Federal Communications Commission, IB Docket No. 03-38 (September 16, 2003) (noting agreement of the NTC and the FCC to "step aside to allow our respective carriers to freely negotiate a mutually acceptable settlement of the issue"); Letter from Michael K. Powell, Chairman, Federal Communications Commission, to Armi Jane Borje, Commissioner, National Telecommunications Commission, IB Docket No. 03-38, (January 5, 2004) (expressing confidence that once circuits are restored "all interested parties can work together to resolve" matters pending before the Commission in applications for review of the Bureau's *Order*).

to facilitate the broad range of economic, social and national security activities between the two countries.

ARGUMENT

I. THERE IS NO CASE OR CONTROVERSY.

As the Commission recognizes in its *Order on Review*, the direct connection of circuits from Philippine carriers to AT&T and MCI was restored in January of this year. Reflective of the fact that the commercial dispute is over, AT&T recently asked the Commission to remove the Philippines from ISP;⁹ AT&T previously requested that the Philippines be restored to ISR status.¹⁰ Furthermore -- contrary to the assertions made in the *Order on Review* -- neither AT&T nor MCI opposed PLDT's earlier *ex parte* request that the Bureau's *Order* be vacated as moot.¹¹

Against this background, there is no justification for the Commission to proceed upon the rationale that "it is not clear that the commercial dispute between the

⁹ See Comments of AT&T Corp. on Removal of the International Settlement Policy, IB Docket 02-324 (filed June 28, 2004).

¹⁰ See Letter from Douglas W. Schoenberger, Government Affairs Director, International, AT&T Corp., to Marlene H. Dortch, Federal Communications Commission, IB Docket No. 03-38 (May 4, 2004); in a separate *ex parte* letter, MCI also stated its support for the removal of ISP conditions on the Philippines route. Letter from Ruth Milkman, Counsel for MCI, to Marlene H. Dortch, Federal Communications Commission, IB Docket No. 03-38 (May 6, 2004).

¹¹ *Order on Review at* ¶ 42. In its January 27, 2004, *ex parte* letter, AT&T opposed only Globe's request to vacate the Bureau's *Order*. See, Letter from James J.R. Talbot, Senior Attorney, AT&T Corp., to Marlene H. Dortch, Federal Communications Commission, IB Docket No. 03-38, (January 27, 2004). Unlike Globe's request, PLDT's request that the Bureau's *Order* be vacated as moot, see, PLDT's Application for Review of the International Bureau's March 10, 2003 Order (IB Docket No. 03-38 (April 9, 2003), did not require any Commission decision on the merits and was unopposed.

U.S. and Philippines carriers has been brought to conclusion.”¹² Such unsubstantiated surmise is not enough to establish either the continued existence of a case or controversy between the parties or a basis to continue this proceeding.

II. LONG-STANDING COMMISSION POLICY REQUIRES THE BUREAU’S ORDER TO BE VACATED AS MOOT.

When orders in pending proceedings have become moot, long-standing Commission practice has been to vacate them.¹³ In *Seven Hills*, the Commission specifically vacated the “Initial Decision” of the Commission’s Administrative Law Judge as moot¹⁴ based upon the parties’ settlement of the underlying dispute while an application for review was pending.¹⁵ In *Seven Hills*, the Commission relied, *inter alia*, upon its earlier decision in *Wodlinger*, in which the Commission concluded that it would be inappropriate to review disputed findings of misconduct in a case which the parties had settled.¹⁶ Indeed, in *Seven Hills* the Commission went so far as to vacate the ALJ’s decision on its own motion.

¹² *Order on Review* at ¶ 45.

¹³ *See, e.g., Amendment of Section 73.606(b) Table of Allotments, TV Broadcast Stations (Ridgecrest, California)*, 12 FCC Rcd 3385, 3385-86 (1997); *The Seven Hills Television Company*, 4 FCC Rcd 4062, 4063 (1989) (“*Seven Hills*”); Constance J. Wodlinger, BC Docket No. 82-736, FCC 85-335 (July 10, 1985) I “*Wodlinger*”) at ¶ 2.

¹⁴ *Seven Hills* at 4063.

¹⁵ *Wodlinger* at ¶ 2.

¹⁶ *Wodlinger* at ¶ 2. Even under the arguably broader authority of the Commission to issue declaratory rulings as to matters of “uncertainty” pursuant to Section 1.2 of its rules, 47 C.F.R. § 1.2., the Commission has followed a practice of not reaching out to rule upon issues of theoretical concern when no actual controversy requires resolution. *See, e.g., Guam Telephone Authority*, 12 FCC Rcd 13938, 13940 (1997);

III. THERE IS NO BASIS FOR EXEMPTING DECISIONS FROM THE COMMISSION’S MOOTNESS POLICY BECAUSE THEY MIGHT BE CITED AS PRECEDENT, AND, IN ANY EVENT, THE COMMISSION’S ISP REFORM ORDER SUPERSEDES THE BUREAU ORDER.

In its *Order on Review*, the Commission asserts that the Bureau’s *Order* should not be vacated because it “provides precedent for enforcing the Commission’s policy against ‘whipsawing’.”¹⁷ As set forth above, the Commission’s precedent instructs that the Bureau’s *Order* should have been vacated as moot;¹⁸ there is no precedent, however, for the Commission’s suggestion that the Bureau’s *Order* should not be vacated as moot because it might be cited as precedent in later cases. Furthermore, the Commission’s refusal to vacate the Bureau’s *Order* in order to preserve it as “precedent” contradicts its statement that the Bureau’s *Order* does not expand the definition of whipsawing¹⁹ but merely reaffirms existing Commission rules and policies on whipsawing.

Of course, if the *Order* did create new rules or policies, the Bureau would have been required to use formal notice-and-comment rulemaking procedures. Thus the Bureau’s *Order* could provide no useful precedent for the additional reason that it was

Omnipoint Communications, Inc., 11 FCC Rcd 10785, 10788 (1996); *Microscope Associates, Inc.*, DA 04-1681 (WCB, June 10, 2004), at ¶ 9 and n.30. In any event, neither the Commission’s *Order on Review*, nor the Bureau *Order* before it, was made pursuant to Section 1.2 of the Commission’s rules. See *Order on Review* at ¶ 47; the Bureau’s *Order* at 3539.

¹⁷ *Order on Review* at ¶44.

¹⁸ *Id.* at ¶ 44; see *Wodlinger* at ¶ 2.

¹⁹ *Order on Review* at ¶31.

reached through an abbreviated proceeding that could not properly produce a new rule of law.

Nor does the Bureau's *Order* have any precedential value in view of the Commission's 2004 ISP Reform Order, which essentially codifies, as a matter of Commission policy, the matters in dispute as to the scope of the Bureau's authority over benchmark-compliant routes, such as the United States-Philippines route, and the process it intends to follow with future disputes.²⁰ Assuming *arguendo* that the Bureau's *Order* might merely have interpreted the Commission's prior rules (or, as PLDT and other Philippine carriers maintain, however far beyond the Commission's then-existing rules the Bureau's *Order* extended), that interpretation lacks all future relevance. As the Commission itself recognizes in a slightly different context,²¹ the Bureau's "interpretation" is completely subsumed into the Commission's newly-stated rules and policies, as set forth in the *ISP Reform Order*.

IV. PRINCIPLES OF COMITY AND THE COMMISSION'S PUBLIC INTEREST STANDARD SUPPORT VACATING THE *BUREAU'S ORDER*.

The Commission has long recognized the importance in the international telecommunications arena of maintaining comity with foreign telecommunications

²⁰ *ISP Reform Order* at 5729-33.

²¹ *Order on Review* at ¶19 (viewing the carriers' requests to modify the Bureau's *Order*'s removal of Philippine carriers from the Commission's list of ISR-approved routes and imposing ISP requirements on agreements with Philippine carriers as "superceded [sic] by our . . . 2004 ISP Reform Order to eliminate our ISP policy and remove the ISP from benchmark-compliant routes").

regulators. The essence of comity is “the broad concept of respect among nations.”²² A need for comity has rarely, if ever, been greater than in this proceeding; only through the combined efforts of the FCC and the NTC was the stalemate between the United States and Philippine carriers resolved. It was only when both regulatory agencies eschewed attacking each other’s regulatory approaches and began efforts toward conciliation that an atmosphere was created allowing the settlement of the carriers’ disputes.²³ As acknowledged in the *Order on Review*, by January, 2004, settlements were achieved between all carriers, and the termination of circuits that spawned this proceeding ceased. Commercial relations have been normalized, a situation beneficial to all carriers and to the public interest of both countries.²⁴

PLDT respectfully submits that the Commission’s failure to follow its own long-standing policy by refusing to vacate the *Order* as moot violates the rules of international comity and creates a tension between the Philippines and the United States that ill serves the public interest of both nations. Reliable traffic flows are in the best interests of U.S. consumers. Philippine and U.S. carriers support a broad variety of commerce between the two nations, cooperation on anti-terrorism surveillance, and community for family members working abroad. The public interest in continued, affordable services between the two countries is best served by vacating both orders.

²² *Centennial Communications Corp.*, 17 FCC Rcd 10794, 10802 (2002), *see Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

²³ *See* note 8 *supra*.

²⁴ *Order on Review* at ¶ 2 and n.6.

CONCLUSION

The commercial dispute in this proceeding ended no later than January 2004. The FCC's refusal to follow its own precedent by vacating as moot the Bureau's *Order* does not serve the public interest, either domestic or international. Accordingly, PLDT respectfully requests the Commission to reconsider its *Order on Review*, and vacate both that *Order* and the Bureau's *Order* as moot.

Dated: Washington, D.C.

July 6, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Reconsideration was sent by first-class mail, postage prepaid, this 6th day of July, 2004, to each of the following:

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